

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network,

Complainant,

vs.

SBC Communications, Inc. dba SBC Pacific
Bell Telephone Company (U-1001-C) and
related entities (collectively "SBC"),

Defendants.

Case 05-11-011
(Filed November 14, 2005)

Utility Consumers' Action Network,

Complainant,

vs.

Cox California Telecom II, LLC, doing
business as Cox Communications, and related
entities (collectively "Cox"),

Defendants.

Case 05-11-012
(Filed November 14, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING
ON MOTIONS TO DISMISS**

Introduction

The Utility Consumers' Action Network (UCAN) filed complaints against Pacific Bell Telephone Company (doing business as SBC California; hereinafter

“SBC”) and Cox California Telcom, LLC (doing business as Cox Communications; hereinafter “Cox”) concerning the alleged failure by both carriers to provide proper access to 911 emergency phone service for certain residential telephone users. The complaint requests the Commission to issue cease and desist orders and to order both carriers to pay penalties, reimbursements, and punitive damages. SBC and Cox (carriers) both answered the complaints.

Based on discussions at the prehearing conference, the scoping memo anticipated that SBC and Cox would file motions to dismiss the complaints based on a variety of legal arguments. The carriers filed their motions to dismiss on January 27, 2006. UCAN’s responses were filed on March 8, followed by the carriers’ replies on March 14. Oral argument of the motions was not requested.

SBC’s Motion to Dismiss

SBC’s motion to dismiss is based on the basic argument that UCAN’s complaint fails to allege “well-pleaded” facts that would entitle UCAN to a legal remedy. SBC argues that UCAN alleges no particular facts to support the desired legal conclusion that the carrier has violated Public Utilities Code Section 2883, establishing the 911 emergency phone requirements for certain residential units with inactive service.

Cox’s Motion to Dismiss

Cox’s motion also argues that UCAN’s complaint does not contain specific factual allegations that the carrier has violated Section 2883. Cox suggests that the complaint seeks to have the Commission adopt new policies concerning the application and implementation of Section 2883, a matter, in Cox’s view, is more appropriate for a Commission rulemaking proceeding. The carriers’ specific

arguments, and UCAN's counterpoint, are discussed more thoroughly in the following sections.

Section 2883

The basic requirement of Section 2883 is set forth in subsection (a): "All local telephone corporations, excluding wireless and cellular telephone corporations, shall, to the extent permitted by existing technology or facilities, provide every existing and newly installed residential telephone connection with access to '911' emergency service regardless of whether an account has been established."

The remaining provisions of Section 2883 require that the Commission prohibit the termination of access to 911 services in the event of nonpayment of a residential account (subsection (b)) and ensure that the carriers notify subscribers of their right to 911 services under this section (subsection (c)). Section 2883 indicates that its provisions do not relieve a customer of a debt due and owing to a telephone corporation (subsection (d)). Section 2883 also includes a declaration that Section 2883 does not require 911 access "if doing so would preclude providing a service to subscribers of residential telephone service" (Subsection (e)).

Motion to Dismiss

The motion to dismiss serves essentially the same function as the general demurrer under California law to test the sufficiency of a pleading such as a complaint or answer. 5 WITKIN, CALIFORNIA PROCEDURE, "Pleading" § 898 (4th ed. 1997); *see also Request of Hospital and Service Employees Union*, 81 Cal. P.U.C. 302 (1997). Indeed, a principal ground for a general demurrer or motion to dismiss is that a complaint does not state facts sufficient to constitute a cause of action. *See* Cal. Code of Civil Proc. § 430.10(e). The pleading defects must

appear on the face of the pleading. The challenged pleading must stand or fall only on the allegations contained therein. Therefore, the parties supporting declarations in this matter have not been considered. The motion to dismiss will be overruled if the complaint sets forth allegations of every fact essential to the statement of a cause of action. *Cf. WITKIN* at §§ 900 & 905.

Complaint Against SBC

UCAN's complaint against SBC contains many statements setting forth no more than its own legal conclusions. Several material factual allegations, however, do emerge: (a) SBC has failed to provide "warm line" 911 access to certain residential units in California (Complaint, Paragraph 2), even though SBC has the facilities and technical means to do so; (b) SBC representatives, when asked about 911 service, have failed to provide the required information about such service (Paragraphs 4 & 19); (c) SBC has reassigned residential telephone numbers even though existing technologies and facilities are sufficient to avoid this "harvesting" (Paragraph 16); and (d) SBC is reassigning telephone numbers, thus interfering with the ability of certain residential customers to access "warm line" 911 services in their residences (Paragraph 18).

These factual allegations may not actually be true but, in order to consider whether UCAN's complaint should be dismissed, the allegations are assumed to be true. *CPN Pipelines Co. v. PG&E*, D.01-05-086 (2001). When so considered, I conclude that UCAN has stated facts sufficient to state one or more causes of action for violations of subsections (a) and (c) of Section 2883. These allegations also satisfy the pleading requirements set forth in the Commission's *Rules of Practice and Procedures* (see specifically Rules 10 and 56).

Complaint Against Cox

UCAN's complaint against Cox is substantially similar to the one filed against SBC and uses the same paragraph numbering system. Other than party information, the only substantive difference appears in Paragraph 19 of the complaint, concerning Cox's alleged knowledge of the importance of providing service in emergency situations.

Based on the previous discussion, I also conclude here that Paragraphs 2, 4, 16, 18, and 19 of the complaint against Cox set forth material factual allegations which, if true, are sufficient to state one or more causes of action against Cox. Cox has denied almost all of the text set forth in these paragraphs, thus placing these factual allegations at issue.

Cox supports its motion to dismiss with other arguments. First, Cox argues that Rule 10 is not satisfied, both because an allegation of existing law is not made and the allegations are not sufficiently specific. The paragraphs identified above do allege breaches of Section 2883, and these factual allegations are more specific than the generalized allegations determined by the Commission to be inadequate in *Stephan v. AT&T Broadband*, 2003 Cal. PUC LEXIS 454. I agree, however, that Paragraph 13 sets forth only legal conclusions, but UCAN apparently does not seek a remedy for any violation of Sections 2895 to 2897.

Cox argues that the complaint raises policy issues that, since they may implicate entire industry practice, are more appropriate for a quasi-legislative proceeding rather than an adjudicatory proceeding. Cox's argument is essentially a challenge to how this proceeding is categorized. An appeal for recategorization of a proceeding is authorized by Rule 6.4; however, Cox did not avail itself of that remedy; and it is now deemed to be waived. Additionally,

adjudicatory proceedings before the Commission often produce outcomes that modify industry practices.

Cox argues that, at least as to Section 2883(b), concerning disconnections for nonpayment, UCAN has not alleged any material facts indicating a violation of this subsection. I agree. Cox's motion to dismiss as to any violation of Section 2883(b) is granted.

Conclusions of Law

1. In its complaints, UCAN has stated facts sufficient to state one or more causes of action for violations of subsections (a) and (c) of Public Utilities Code Section 2883.

2. In its complaints, UCAN has not stated facts sufficient to state a cause of action for any violation of Section 2883(b) or of Sections 2875 to 2897.

Therefore, **IT IS RULED** that:

1. The motions to dismiss Pacific Bell Telephone Company (doing business as SBC California) and Cox California Telcom, LLC (doing business as Cox Communications) are granted to the extent that UCAN has failed to assert facts sufficient to state a cause of action for violation of Public Utilities Code Section 2883(b), 2895, or 2897.

2. In all other respects, the motions to dismiss are denied.

3. The parties shall now proceed with the Phase II schedule as set forth in the Scoping Memo.

Dated April 6, 2006, at San Francisco, California.

/s/ JOHN E. THORSON

John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling on Motions to Dismiss on all parties of record in this proceeding or their attorneys of record.

Dated April 6, 2006, at San Francisco, California.

/s/	FANNIE SID
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	Fannie Sid

NOTICE

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